SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

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October Term, 1970

No. 1404

JESUS ENRIQUE NORIEGA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Jerry J. Kaufman, attorney for Petitioner, Jesus Enrique Noriega, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on January 29, 1971.

Opinions of the Courts Below.

The petitioner, Jesus Enrique Noriega, was convicted in the United States District Court, District of Nevada, on a five-count indictment, charging violations of federal narcotics laws, namely: two infractions of 21 U.S.C. § 174 (Sale or Facilitation of the Sale of Unlawfully Imported Cocaine) and three infractions of 26 U.S.C. § 4705(a) (Transferring Cocaine Without a Written Order Form). Five year sentences as to each count, running concurrently, were rendered by the District Court and such conviction and sentencing was

appealed to the United States Court of Appeals for the Ninth Circuit. The opinion of the Court of Appeals for the Ninth Circuit is reported at ..... F. 2d ....., No. 25,574 (9th Cir. January 29, 1971).

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on January 29, 1971, and a copy thereof is appended to this petition in the appendix as Exhibit "A". The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

The trial court made numerous comments in the presence of the jury. Said comments were quoted in petitioner's (appellant's) brief to the United States Court of Appeals for the Ninth Circuit. The comments so prejudiced the minds of the jury, or so confused the minds of the jury, that the defendant petitioner could not have been given a fair trial under our system of justice or our due process philosophy. The comments of the trial court were alleged as errors in the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the conviction.

The questionss presented here are:

1. Were the comments made by the Court so prejudicial and/or confusing that the petitioner was denied a fair trial?

2. Were the comments by the Court so prejudicial and/or confusing that the error committed cannot be deemed harmless?

Statement.

Jesus Enrique Noriega was convicted for violations of the federal narcotic laws. He appealed to the United States Court of Appeals for the Ninth Circuit, urging continually that the trial court erroneously prejudiced the minds of the jurors and/or confused their minds to such a point that a fair trial was impossible. This argument was propounded in the Opening Brief and in the Reply Brief by the petitioner, yet no mention is made in the official report filed January 29, 1971. The Appellate Court dealt briefly with the question of the challenged telephone conversation and said that the appellant's contentions were not persuasive and that the trial judge did not abuse his discretion.

Reasons for Granting the Writ.

The decision below should be reviewed because the Court, it is alleged, erroneously decided that the comments made by the judge, if prejudicial or confusing at all, are nevertheless harmless. Although the Court did not specifically say this, it avoided the question; but such avoidance does not grant the petitioner the due process and fairness that must be accorded to defendants in criminal trials. To deny the writ would disrupt all conscientious efforts to accord defendants fair and impartial trials. To deny the writ would allow prejudicial comments by a Court to sway the minds of lay jurors; and, in the case at bar, not only to sway the minds of the jurors but conceivably to confuse them. It is conceivable that the jury would have convicted the petitioner notwithstanding the comments by the

Court. However, it is also conceivable from the record that the jury may have acquitted the petitioner had the comments not been made. It is the latter alternative that must be conjecture and we will never know the answer. And, therefore, such conjecture should not exist and is the reason for the granting of the writ.

The defendant should be entitled to a fair and impartial jury trial. He is not asking to be relieved of the charges, but merely to have the case remanded for a fair and impartial trial to which he is constitutionally guaranteed. A jury could acquit him with the omission of the alleged prejudicial and confusing comments by the trial court, and unless this Honorable Supreme Court of the United States grants certiorari for review, then the harmful effect of the court's comments will remain as the depriving tool of injustice and unfairness. The comments of the trial court cannot be deemed harmless or minor technical errors, and this Court has said:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." (*Kotteakos vs. United States,* 66 S.Ct. 1239, at 1248.)

Furthermore, it has been held that,

> "Before a federal constitutional error can be held harmless, the court must be able to declare a be-

lief that it was harmless beyond a reasonable doubt. (*Ganger vs. Peyton,* 379 F.2d 709 (4th Cir. 1967). Also cited: *Chapman vs. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed 2d 705, 711 (1967).)"

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

JERRY J. KAUFMAN,

Attorney for Petitioner.

EXHIBIT "A".

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Jesus Enrique Noriega, Appellant, v. United States of America, Appellee. No. 25,574.

[January 29, 1971]

Appeal from the United States District Court for the District of Nevada

Before: DUNIWAY, ELY and TRASK, Circuit Judges.

PER CURIAM:

Noriega appeals from his conviction on five counts of a five-count indictment charging violations of federal narcotics laws arising out of two separate transactions involving cocaine.[1] Appellant stands convicted on two counts of violating 21 U.S.C. § 174 (Sale or Facilitation of the Sale of Unlawfully Imported Cocaine) and three counts of violating 26 U.S.C. § 4705 (a) (Transferring Cocaine Without a Written Order Form). He received a five-year sentence as to each count with all sentences to run concurrently. We affirm.

Appellant contends that there is insufficient evidence to prove that he had knowledge of the illegal importation of the cocaine which he is charged with selling in violation of 21 U.S.C. § 174. He argues that the only evidence of his knowledge is the testimony of a narcotics agent as to statements made to him by co-defend-

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[1]His co-defendant, Manuel Revuelta, was charged and convicted on two counts of the indictment. Revuelta's conviction was affirmed recently by this court, *United States v. Revuelta*, ...F.2d ...., No. 25981 (9th Cir. Jan. 8, 1971).

ant Revuelta over the telephone concerning the foreign origin of the narcotics. Appellant further argues that this testimony was admitted into evidence without a proper foundation being laid as to the identity of the party with whom the agent conversed.

Appellant presents no challenge to his conviction under 26 U.S.C. § 4705(a). As this court pointed out in *United States v. Revuelta,* ..... F.2d ....., No. 25,981 (9th Cir. Jan. 8, 1971,) knowledge of illegal importation is not an element of that offense, and consequently, the concurrent sentence doctrine makes it unnecessary for us to decide the questions posed by appellant. E.g., *United States v. Tamayo,* 427 F.2d 1072 (9th Cir. 1970); *United States v. Wong,* 425 F.2d 1077 (9th Cir. 1970); *United States v. Felix,* 425 F.2d 240 (9th Cir. 1970); *Jordan v. United States,* 416 F.2d 338, 346 (9th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970).

Notwithstanding this fatal defect, we find that on the merits of the appeal, appellants' contentions are not persuasive. The circumstantial evidence surrounding the challenged telephone conversations was sufficient for us to conclude that the trial judge did not abuse his discretion in determining that a prima facie case of identification had been made out. *Carbo v. United States,* 314 F.2d 718-742-43 (9th Cir. 1963), *cert. denied,* 377 U.S. 953 (1964). After having completed a sale of cocaine with Revuelta and Noriega on February 18, 1969, the narcotics agent was given a business card by Revuelta and instructed to call the telephone number listed thereon. The agent made several calls to that number. Pursuant to one of the calls he was told Noriega would call him. Noriega did, in fact, call and

arrangements were made which ultimately resulted in a sale of cocaine by Noriega on March 20, 1969.

Where there is enough independent evidence of a concert of action, as there was in this case, the mere statement of co-defendant Revuelta as to the foreign source of the cocaine, made out of appellant's presence, has been held sufficient to establish that appellant had knowledge of its illegal importation. *United States v. Williams,* ..... F.2d ....., No. 24,923 (9th Cir. Nov. 23, 1970). In this case the evidence of appellant's knowledge is much stronger than that present in *Williams.* Here there was testimony from a narcotics agent that appellant had stated on February 17, 1969, that the cocaine he had at that time, and which was subsequently transferred, was from Spain. There was also testimony as to similar statements made by appellant on March 20, 1969, concerning the Peruvian origin of the cocaine he was transferring on that occasion.

Affirmed.